No. 89-404

IN THE

Supreme Court of the United States

October Term, 1989

PAUL C. MAGGIO d/b/a Patchogue Nursing Center,

Petitioner,

against

LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, R.W.D.S.U., AFL-CIO,

Respondents.

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against

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Brief of the New York State Health Facilities Association, Inc. *Amicus Curiae*, in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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CORNELIUS D. MURRAY, ESQ.
Attorney for Amicus Curiae
100 State Street
Albany, NY 12207-1885
(518) 462-5601

DAVID M. CHERUBIN, ESQ.
O'CONNELL AND ARONOWITZ
Of Counsel

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Statement of Interest

This *Amicus Curiae* Brief is submitted on behalf of the New York State Health Facilities Association, Inc. ("NYSHFA") in support of the Petition by Paul C. Maggio d/b/a Patchogue Nursing Center for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. All of the parties to this litigation have been advised of NYSHFA's intent to file this Brief and all parties have consented to its submission.

NYSHFA is a not-for-profit corporation whose membership consists of over two hundred thirty long term care residential health care facilities throughout the State of New York. These facilities render "skilled nursing facility" or "intermediate care facility" services as defined in the federal Medicaid Act (42 U.S.C. §1396 *et seq.*) to some 35,000 sick, elderly and infirm patients. The employees of these facilities provide intensive nursing and physical care to patients who are unable to care for themselves.

NYSHFA has a significant and substantial interest in the outcome of the instant litigation. Many of its member residential health care facilities have collective bargaining agreements, governed by the Labor Management Relations Act (29 U.S.C. §141 *et seq.*), that address a facility's ability to terminate unionized employees, among whom are employees that have been found guilty of patient abuse, neglect or mistreatment under procedures embodied in the Public Health Law of the State of New York. The disposition of the case will affect these unionized facilities' ability to satisfy their federal and state statutory duties to provide qualified personnel and to protect their patients from abuse, neglect or mistreatment.

Summary of Argument

In recognition of the vulnerable status of patients residing in residential health care facilities, federal and state law has been enacted to protect these patients from abuse, neglect and mistreatment. Specifically, the New York State Legislature, in order to restore the public's confidence in its ability to protect the elderly and infirm, vested the Commissioner of the New York State Department of Health ("Commissioner") with the authority to investigate and determine all alleged incidents of patient abuse, neglect or mistreatment. It would defeat this clear public policy, as well as place the operators of residential health care facilities in an untenable situation where they may be found to be in violation of their federal and state statutory duties to protect their elderly patients, if a labor arbitrator can make independent factual findings concerning alleged incidents of patient abuse, neglect or mistreatment inconsistent with findings already made by state authorities acting pursuant to a procedure under state law which gives the person charged a full opportunity to contest the charges in a due process, evidentiary hearing.

It is *not* NYSHFA's position that the law of New York State vesting the Commissioner with the authority to investigate and determine suspected incidents of patient abuse, neglect or mistreatment divested the labor arbitrator of his power to fashion an award. Rather, it is NYSHFA's position that the well-defined legislative policy of the State of New York and the federal government divested the labor arbitrator of the power to make *independent factual findings* concerning the suspected patient abuse, neglect or mistreatment. The labor arbitrator retained the authority to fashion an appropriate rational award based on the Commissioner's findings.

Accordingly, the novel and significant question of federal law presented by the instant case is:

Whether, as a logical extension of the *United Paperworkers Intern. Union v. Misco, Inc.* (484 U.S. 29 [1987]) standard, a labor arbitrator, acting pursuant to a collective bargaining agreement governed by the Labor Management Relations Act, is divested of his authority to make independent factual findings regarding patient abuse when there is a dominant and well-defined policy vesting such authority in the hands of a State Commissioner uniquely situated to protect the interests of third parties, namely, the sick, elderly and infirm patients of residential health care facilities.

ARGUMENT

The instant case presents a novel and significant question of federal law involving the authority of a labor arbitrator, acting pursuant to a collective bargaining agreement governed by the Labor Management Relations Act, to make independent factual findings exonerating a nursing home employee of patient abuse at variance with findings of abuse already made by a State Commissioner charged with the statutory duty to protect nursing home patients under a procedure that affords the employee the right to a due process, evidentiary hearing

Although courts generally will not review the merits of arbitration awards (*see United Steel Workers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 [1960]), it is well established that an exception to this rule exists when the issue submitted, or the award fashioned, conflicts with public policy (*see Hurd v. Hodge*, 334 U.S. 24, 34-35 [1948]). Resolution of the public policy question resides with the courts and, recently, in *United Paperworkers Intern. Union v. Misco, Inc.* (484 U.S. 29 [1987]), the United States Supreme Court articulated the standard to be applied:

> [A] court's refusal to enforce an arbitrator's *interpretation* of such [collective bargaining agreement] is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant and is to be ascertained by 'reference to the laws and legal precedents and not from general considerations of supposed public interests.' "

(*Id.* at 43 [quoting *W. R. Grace and Co. v. Rubber Workers*, 461 U.S. 757, 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 [1945])]).

Here, the *Misco* standard was satisfied, because the New York State Legislature, in order to protect patients residing in residential health care facilities, vested the Commissioner of Health with the exclusive authority to investigate and determine alleged incidents of abuse, neglect or mistreatment (cf., *Walters v. Fullwood*, 675 F. Supp. 155, 162 [SDNY 1987] [Chief Judge Briant emphasized that the New York Legislature has "spoken on the subject"]; *see also Matter of Estate of Walker*, 64 N.Y.2d 354, 359, 476 N.E.2d 298, 301, 486 N.Y.S.2d 899, 902 [1985] ["(W)hen we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, the *statutes* or judicial records" (emphasis added)]).

By the early 1970's, public confidence in New York State's ability to protect "its most defenseless citizens, the aged and infirmed," had been destroyed (*see* Governor's Memorandum, McKinney's 1975 Session Laws of New York, at 1764-1765). To restore the public's confidence, and to provide protection for the aged and infirmed, the Legislature enacted a series of statutes.

The cornerstone of the legislation passed to redress this problem was Public Health Law §2803-c. This statute, commonly referred to as the "Patient's Bill of Rights," guarantees a myriad of rights including a patient's right to be "free from mental and physical abuse" (N.Y. Pub. Health Law §2803-c[3][h] [McKinney's 1985]) and the right "to receive courteous, fair and respectful care and treatment" (N.Y. Pub. Health Law §2803-c[3][g] [McKinney's 1985]; *see also* N.Y. Comp. Code R. & Reg. tit. 10, §730.17[a][7] [1981]; N.Y. Comp. Code R. & Reg. tit. 10, §414.14 [1987]). Operators of health care facilities are duty bound to adhere to these rights, and failure to do so is punishable by a fine of up to $1,000 per day (*see* N.Y. Comp. Code R. & Reg. tit. 10, §732.1 [1984]; N.Y. Comp. Code R. & Reg. tit. 10, §414.18 [1982]). Concomitantly, operators of residential health care facilities are required to provide "qualified personnel . . . as are necessary to assure the health, safety, proper care and treatment of the patients" (N.Y. Comp. Code R. & Reg. tit. 10, §414.17[a] [1982]). Violation of this duty is punishable by a maximum fine of $750 per day (*see* N.Y. Comp. Code R. & Reg. tit. 10, §414.18 [1982]).

The New York State Legislature, expressly finding that patients at residential health care facilities were still not receiving adequate protection, enacted Public Health Law §2803-d in 1977 (*see* 1977 N.Y. Laws 900, section 1). This statute places an affirmative duty on certain persons, including operators and employees of residential health care facilities, to report to the Department of Health any suspected incident of patient abuse, neglect or mistreatment (N.Y. Pub. Health Law §2803-d[1] [McKinney's 1985]). Once a suspected incident is reported, as was the case here, the Commissioner is mandated to investigate the suspected incident, and to make a written determination as to whether the abuse, neglect or mistreatment had indeed

occurred (N.Y. Pub. Health Law §2803-d[6][a] [McKinney's 1985]). The employee charged with the abuse has a full and fair opportunity to contest the charges before the Commissioner in a due process, evidentiary hearing (N.Y. Pub. Health Law §2803-d[6][d]).

Paralleling this body of state law is a recent expression of federal legislative intent. On December 22, 1987, the Omnibus Budget Reconciliation Act of 1987, Public Law 100-20 ("OBRA"), was enacted, wherein strict requirements ensuring the protection of Medicaid and Medicare patients was established (*see* 42 U.S.C. §1395i-3). The panoply of rights set forth in OBRA include a skilled nursing facility patient's "right to be free from physical or mental abuse" (42 U.S.C. §1951i-3[c][1][A][ii]). Federal regulation requires that a facility must establish written policies protecting the rights of its patients so as to guarantee that each patient "is treated with consideration, respect and full recognition of his dignity and individuality" (42 C.F.R. §405.1121[k][9]). A facility operator's failure to comply with this federal, statutory and regulatory scheme, such that a patient's health or safety is immediately jeopardized, results in the Secretary for Health and Human Services (1) immediately appointing temporary management, or (2) terminating the facility's Medicare or Medicaid participation (42 U.S.C. §1395i-3[h][2][A][ii]).

The statutory scheme outlined above, leads inexorably to the conclusion that the New York State Legislature has vested the Commissioner of the Department of Health with the sole authority to make factual determinations regarding patient abuse. An example brings this conclusion clearly into focus.

Consider that a nurse's aide is alleged to have sexually molested and beaten a patient of a residential health care

facility. Pursuant to Public Health Law §2803-d, the alleged abuse is reported to the Commissioner. After an investigation, the Commissioner ultimately determines that the nurse's aide did molest and beat the patient. At the same time, pursuant to a collective bargaining agreement, an arbitrator is about to decide whether the same incidents are grounds for termination of the nurse's aide's employment. If the arbitrator is permitted to make his own findings, it is conceivable that the arbitrator may find that the nurse's aide did not molest or beat the patient and, therefore, the arbitrator would require the facility to reinstate the nurse's aide. The residential health care facility would then be required to reinstate an employee who had been found by the Department of Health to have sexually molested and beaten a patient. Such a result would do violence to the statutory scheme established by the United States and New York State Legislatures. The interests of a vulnerable class of persons—residents of nursing homes—would be disregarded.

Upon reinstatement of the nurse's aide, the operator of the facility would be subject to significant daily fines for violation of his duty to both provide "qualified personnel" and to protect patients from further abuse. This threat of inconsistent findings, coupled with the statutory expression of public policy vesting the Commissioner of the Department of Health with the exclusive authority to investigate and determine whether alleged incidents of abuse had occurred, constitutes a dominant and well-defined public policy divesting arbitrators of the power to make findings regarding alleged incidents of abuse of patients residing in residential health care facilities (*cf., Local One, Amalgamated Lithographers of Am. v. Stearns & Beale*, 812 F.2d 763, 769 [2d Cir. 1987]; *Matter of Cohoes City School Dist. v. Cohoes Teachers Assn.*, 40 N.Y.2d 774, 777-778, 358 N.E.2d 878, 880-881, 390 N.Y.S.2d 53, 55-56 [1976]).

The courts below misapprehended the nature of this public policy when they concluded that the arbitrator was not bound by the Commissioner's findings. Allegations of abuse and the protection of nursing home residents are not merely private matters (*cf. American Safety Equip. Corp. v. Maguire*, 391 F.2d 821, 826 [2d Cir. 1968]). Residents of nursing homes are a vulnerable class of persons often dependent upon others for vindication of their rights and protection of their bodily integrity.

Here, Petitioner Maggio and Respondent Local 1199 are not the only entities interested in the outcome of the arbitration proceeding. Indeed, the most interested parties are those persons who reside in Patchogue Nursing Center, including patients who are recipients of Federal Medicaid and Medicare assistance.

In order to protect residents of residential health care facilities from abuse, the United States and New York State Legislatures established a comprehensive statutory scheme, including the New York statute requiring that all incidents of suspected abuse must be reported to the Commissioner. The Commissioner is then obligated to investigate the allegations and make findings. The New York State Legislature purposefully reposed this duty in the Commissioner because he is uniquely situated to act as the guarantor of resident safety.

It is not the position of NYSHFA that a labor arbitrator, acting pursuant to an agreement governed by the Labor Management Relations Act, is divested of jurisdiction over employee terminations based upon abuse of residents. The arbitrator retains jurisdiction to fashion an appropriate rational award based upon the Commissioner's findings.

In the instant case, the arbitrator reached findings inconsistent with the Commissioner's findings. Significantly, the Commissioner found that employee Ackley intentionally elbowed patient Leon Cootner and intentionally pushed patient Florence Cattani against the wall and held the strings of her restraints. The arbitrator based his award upon his determination that these intentional acts of abuse had not occurred. For this reason, Local 1199's reliance on *Local 453, Int'l Union of Elec. Radio & Machine Workers v. Otis Elevator Co.* (314 F.2d 25 [2d Cir.], *cert den* 373 U.S. 949 [1963]) is misplaced. In *Local 453,* the arbitrator's findings of fact were consistent with the findings made by the court. Moreover, an operator's duty to provide "qualified personnel" is inextricably linked to his duty to protect patients from abuse, neglect or mistreatment. It is hardly speculative to expect that an operator may be held to have violated his duty to employ "qualified personnel" if he must reinstate an employee found by the Commissioner to be a patient abuser.

Therefore, if it is accepted—that Public Health Law §2803-d, and federal and state public policy divested the arbitrator of the authority to make independent factual findings regarding the occurrence or non-occurrence of patient abuse—the arbitrator's award must be vacated.

Conclusion

The Petition for a Writ of Certiorari should be granted.

Dated: October 26, 1989

Respectfully submitted,

CORNELIUS D. MURRAY, ESQ.
Attorney for *Amicus Curiae*
100 State Street
Albany NY 12207-1885
(518) 462-5601

Of Counsel:
DAVID M. CHERUBIN, Esq.
O'Connell and Aronowitz